IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. .

EMIL STEIN,
Petitioner and Appellant below,

vs.

PRESTON DELANO, Comptroller of the Currency, and RODGER E. BROOKS, substituted for E. LORRY KEETON, Receiver of the NEW JERSEY NATIONAL BANK & TRUST COMPANY OF NEWARK, NEW JERSEY,
Defendants and Appellees below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*.

I.

Opinions of the Courts Below.

The opinion of the District Court for the District of New Jersey in this case is reported in 35 Fed. Supp. 260. The opinion on appeal in the Circuit Court of Appeals for the Third Circuit has not yet been officially reported, but is found in the accompanying record at page 83.

II.

Jurisdiction.

A concise statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment in question, has been given under Heading II in the petition, and in the interest of brevity will not be repeated in the brief.

III.

Statement of the Case.

A concise statement of the case containing all that is material to the consideration of the questions presented, has been given under Heading I of the petition, and in the interest of brevity will not be repeated in the brief.

IV.

Specification of Errors.

The specification of errors is substantially the same as the reasons for the allowance of the writ as set forth under Heading IV of the petition, but, for convenience, may be paraphrased as follows:

1. The Circuit Court of Appeals erred in refusing to sustain jurisdiction of the District Court over the Comptroller of the Currency who was served with process in the

District of Columbia—since such jurisdiction is particularly authorized and recognized under Title 28 U. S. C. Sec. 110.

2. The Circuit Court of Appeals erred in holding that creditors in receiverships are entitled to moratory interest after their acknowledged acceptance of the receipt of the full principal of their claims.

3. The Circuit Court of Appeals erred in substituting its interpretation of the law applicable to the issues before it, and in refusing to follow the local law of New Jersey that moratory interest was not recoverable by a creditor after the acceptance of the full principal of his claim—thus conflicting with Title 28 U. S. C. Sec. 725.

4. The Circuit Court of Appeals erred in refusing to have due regard for the local law of New Jersey, as set out in the third specification, in the determination of depositors' rights emanating from the "National Banking Act"—since the Federal Statute is silent upon the particular issue, and the local New Jersey law does not impinge upon the Federal Statute.

5. The Circuit Court of Appeals erred in refusing to follow the local law of New Jersey, thus conflicting with prior decisions of this Court.

V.

Argument.

Summary of the Argument.

Point I—The interpretation in the case at bar of Title 28 U. S. C. Sec. 110, dealing with jurisdiction over the Comptroller of the Currency is in conflict with the Fifth and Second Circuits.

Point II—The decision of the Circuit Court of Appeals conflicts with the local law of New Jersey, which provides that the receipt by a creditor of the full principal of a debt discharges all liability for moratory interest thereon.

Point III—The interpretation in the case at bar of the applicable substantive law—if New Jersey local law does not apply—is in conflict with the Second, Fifth and Eighth Circuits.

Point IV—The legal effect upon the right to collect moratory interest after the acknowledged acceptance of the receipt of the full principal of their claims by depositors of a national bank in liquidation is a matter of paramount public importance involving federal law, which has not been, but should be settled by this Court.

Point V—The interpretation in the case at bar of the applicable substantive law—if New Jersey local law does not apply—is in conflict with decisions of this Court—assuming that the law generally applying as between debtor and creditor relationships, applies with equal force to the repayment of creditors' claims in national bank liquidations.

POINT I.

The interpretation in the case at bar of Title 28 U. S. C. Sec. 110, dealing with jurisdiction over the Comptroller of the Currency is in conflict with the interpretation by the Fifth and Second Circuits.

Section 49 of the Judicial Code, (Title 28 U. S. C. Sec. 110) entitled, "Proceedings to Enjoin Comptroller of Currency" provides as follows:

> "All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, *shall be had in the district where such association is located.*"

Notwithstanding the suit below was instituted by petitioner as one of the plaintiffs on behalf of himself, *The New Jersey National Bank and Trust Company of Newark, New Jersey,* and all of the stockholders thereof, to enjoin the Comptroller of the Currency from distributing the monies in his possession as moratory interest to the depositors, the District Court held that such a class action was not comprehended within the provisions of the foregoing section, (R. 70).

The refusal of the Circuit Court of Appeals to pass upon the jurisdictional phase of the District Court's opinion (R. 92) leaves the District Court decision as the prevailing rule in the Third Circuit.

The District Court (R. 71) conceded that its conclusion in respect to the jurisdictional question was at odds with

the rule prevailing in the Fifth Circuit, (*O'Connor, Comptroller* v. *Watson*, 81 Fed. (2nd) 833), and in the Second Circuit, (*Abel, et al.* v. *Hellawell, et al.*, 25 Fed. Supp. 446). Such a conflict in the various circuits ought to be resolved by this Court in order that stockholders of national banking institutions may know definitely whether, in suits instituted by them on behalf of the bank, they can acquire jurisdiction over the Comptroller in the district where the bank is located.

The Comptroller, likewise, ought to know in advance whether he must defend all class actions instituted to enjoin him in the various districts throughout the United States (where the respective banks are located), or whether he may insist that all such actions be instituted in the District of Columbia where he usually resides.

The urgent need of resolving this conflict warrants the allowance of the Writ of *Certiorari* prayed for herein.

POINT II.

The decision of the Circuit Court of Appeals conflicts with the local law of New Jersey, which provides that the receipt by a creditor of the full principal of a debt discharges all liability for moratory interest thereon.

The local law of New Jersey is found in *Freeholders* v. *Veghte*, 7 N. J. Law Journal 145. This decision was rendered in the Somerset County Circuit Court in 1884. The Circuit Court is an intermediate court in New Jersey, but its decision, as rendered in the cited case, has never been re-

versed or modified. This case was followed in *Farmers' Mutual Fire Insurance Company* v. *Opdyke*, 32 N. J. Law Journal, 112, and was cited with approval in *Warren, etc.* v. *Hartford, etc.*, 102 N. J. L. 616, 133 A. 479.

The *Warren* case was decided in 1926 by the highest court of the State of New Jersey—the New Jersey Court of Errors and Appeals.

Inasmuch as the decision of the Circuit Court of Appeals refused to follow the local law of New Jersey as expounded in the foregoing decisions, it is in conflict therewith. Title 28 U. S. C. Sec. 725. Its refusal to apply the local law warrants the allowance of a writ of *certiorari*. *Ruhlin* v. *New York L. Ins. Co.*, 304 U. S. 202; *Rosenthal* v. *New York L. Ins. Co.*, 304 U. S. 263; *New York L. Ins. Co.* v. *Jackson*, 304 U. S. 261; *Fidelity Union Trust, etc.* v. *Field*, 311 U. S. 169; *West* v. *Amer. Tel. & Tel. Co.*, 311 U. S. 223; *Six Cos. of Cal.* v. *Joint Highway Dist.*, 311 U. S. 180.

POINT III.

The interpretation in the case at bar of the applicable substantive law—if New Jersey local law does not apply—is in conflict with the Second, Fifth, and Eighth Circuits.

In departing from the general contract rule that the receipt of the full principal of a debt discharges any liability for moratory interest thereon, the decision in the Circuit Court of Appeals is in conflict with the Second Circuit in *Rice* v. *Eisner*, 16 Fed. (2d) 358; *U. S.* v. *Steinberg*, 100 Fed.

(2d) 124; the Fifth Circuit in *City of Texarkana* v. *Arkansas-Louisiana Gas Co.*, 118 Fed. (2d) 289 at 295; and the Eighth Circuit in *Nelson, et al.* v. *Chicago, etc., Corp.*, 76 Fed. (2d) 17 at 22.

Such conflict ought to be resolved, and the allowance of a writ of *certiorari* will accomplish the desired result.

POINT IV.

The legal effect upon the right to collect moratory interest after the acknowledged acceptance of the receipt of the full principal of their claims by depositors of a national bank in liquidation is a matter of paramount public importance involving federal law, which has not been, but should be settled by this Court.

Whether the general debtor-creditor relationship between a bank and a depositor, subsists after a receiver of a national bank has been appointed, is a question which has never been decided by this Court. Admittedly in New Jersey (R. 74), the general rule in debtor and creditor relationships is that the receipt of the full principal of the debt discharges liability for moratory interest thereon.

Query: Does the same rule which applies as between debtor and creditor generally, discharge the liability for moratory interest, after a receiver of a national bank has been appointed, and from time to time pays dividends on account of principal, so that finally all of the principal has been re-paid to the depositor?

This question may appear to have been touched upon in *National Bank* v. *Mechanics National Bank*, 94 U. S. 437,

but examined carefully, the decision in that case was predicated upon the local law of New York, which provided that the allowance of a claim by a receiver was tantamount to a judgment, and since a statute in New York allowed judgments to carry interest, the rule that payment of the principal discharged liability for moratory interest, did not apply.

New Jersey has no similar statute allowing interest on judgments. Accordingly, interest on judgments, as well as interest on claims not reduced to judgment, retain the character of moratory interest. Consequently, the decision in the *National Bank* v. *Mechanics National Bank* case, *(supra)* cannot be said to have disposed of the issue so far as national banks in New Jersey are concerned.

The question is of paramount public importance. The liquidation of national banks recently has resulted in large surpluses over and above the amount necessary to re-pay depositors the full principal of their claims. The issue involved in the case at bar was recognized as being unsettled in *Ticonic National Bank* v. *Sprague,* 303 U. S. 406, where this Court held:

> "As an incident to the right to recover an unexpended balance in a deposit, a depositor is entitled to interest as damages for the failure to pay that balance upon demand. *Compare* Stewart *v.* Barnes, 153 U. S. 456, 462, 38 L. ed. 781, 784, 14 S. Ct. 849; United States *v.* North Carolina, 136 U. S. 211, 216, 34 L. ed. 336, 338, 10 S. Ct. 920."

Unless this Court felt that the issue was questionable, it would not have suggested a comparison of the first sentence with the doctrine enunciated in *Stewart* v. *Barnes,*

153 U. S. 456. The latter case is authority for the proposition that payment and acceptance of the principal of a debt discharges liability for moratory interest.

The importance of this public question, affecting as it does, liquidation of banks throughout the country, and the rights of thousands of depositors involving millions of dollars, warrants the allowance of a writ of *certiorari* to once and for all settle the issue.

POINT V.

The interpretation in the case at bar of the applicable substantive law—if New Jersey local law does not apply—is in conflict with decisions of this Court—assuming that the law generally applying as between debtor and creditor relationships, applies with equal force to the repayment of creditors' claims in national bank liquidations.

This Court in *Stewart* v. *Barnes*, (*supra*) held that payment of the full principal of an obligation discharges any claim for moratory interest. This same theory was recognized in *Girard Trust Co.* v. *U. S.*, 270 U. S. 163 at 168. The *result* in the latter case, however, differed from the result in the *Stewart* case, due to the fact that an applicable statute in the *Girard* case, specifically provided for the repayment of the obligation with interest. This Court there held that the facts were distinguishable from the *Stewart* case, *but the rationale of the Stewart case was expressly approved.*

Insofar as the reasoning of the Stewart case is applicable to the relationship between depositor and a receiver of a national bank in liquidation, the decision of the Circuit Court of Appeals is in conflict with applicable decisions of this Court, and warrants the issuance of a writ of *certiorari*.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of *certiorari* and thereafter reviewing and reversing said decision.

Dated: July 31, 1941.

SAUL J. ZUCKER,
LIONEL P. KRISTELLER,
Attorneys for and of Counsel with Petitioner.